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**Re: Commonwealth Essential Health Benefits Benchmark Plan—Public Comment Period; Notice 2023-14**

To the Office of the Insurance Commissioner,

The National Center for Transgender Equality writes today in response to Notice 2023-14, regarding updating the Commonwealth of Pennsylvania's Essential Health Benefits (“EHB”) benchmark plan (the “benchmark plan”). As the Commonwealth’s existing benchmark plan does not include coverage for medically-necessary transition-related healthcare, this is the perfect opportunity to remedy that inequity and extend coverage of medically-necessary care to the approximate 56,000 transgender people living in Pennsylvania.

**About NCTE**

Founded in 2003, the National Center for Transgender Equality (“NCTE”) works to improve the lives of the nearly two million transgender people in the United States and their families through sound public policy, public education, and groundbreaking research. NCTE has worked with countless health and human service providers as well as local, state, and federal agencies on policies to ensure equal access to vital health and human services. In 2015, NCTE conducted the U.S. Transgender Survey, the largest survey to date of transgender people, with nearly 28,000 respondents from all 50 states and the U.S. territories. Data analysis of the follow-up 2022 U.S. Transgender Survey is currently underway.

**Transition-Related Healthcare Is Medically Necessary**

The medical and scientific community overwhelmingly recognizes that a person’s innate psychological experience of gender is an inherent aspect of the human experience for all people, including transgender people. While being transgender need not and should not be a barrier to opportunity in the United States, today transgender Americans are more likely both to need, and to face barriers to accessing health care coverage and services, especially pertaining to transition-related care.

According to the 2015 U.S. Transgender Survey, one in four respondents reported experiencing difficulty with their insurance because they were transgender in the year prior to taking the survey, including denial of coverage for transition-related care, denial of coverage that was deemed gender-specific, insufficient provider networks, barriers to updating critical information in the insurers’ systems, and even denials of routine

coverage of non-transition-related healthcare.<sup>1</sup> The problem was particularly acute for respondents who had sought coverage of transition-related surgical care in the prior year, with 55% reporting they were denied coverage for transition-related surgery and 42% reporting that insurance covered only some of the transition-related surgical care they needed.<sup>2</sup> With many transgender people forced to pay for transition-related care out-of-pocket, it is unsurprising that the U.S. Transgender Survey also found a significant correlation between annual income and lifetime history of transition-related surgical care.<sup>3</sup> Respondents in Pennsylvania demonstrated only a slightly lower rate (24% v. 25%) of insurance issues in the prior year,<sup>4</sup> demonstrating that the Commonwealth is not immune from this problem.

And problem it is, since transition-related care saves lives. In fact, there is a growing consensus among professional medical organizations that transition-related care, including surgical procedures such as facial feminization, are medically necessary and therefore, must be included in health coverage. Medical organizations endorsing the importance of transition-related care include the American Medical Association,<sup>5</sup> American Public Health Association,<sup>6</sup> American Psychological Association,<sup>7</sup> American Psychiatric Association,<sup>8</sup> American College of Obstetricians and Gynecologists,<sup>9</sup> American Academy of Pediatrics,<sup>10</sup> American Academy

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<sup>1</sup> Sandy E. James et al., “The Report of the 2015 U.S. Transgender Survey” at 95 (2016), available at <https://transequality.org/sites/default/files/docs/usts/USTS-Full-Report-Dec17.pdf>.

<sup>2</sup> *Id.*

<sup>3</sup> *Id.* at 101.

<sup>4</sup> National Center for Transgender Equality, “2015 U.S. Transgender Survey: Pennsylvania State Report” at 3 (2017), available at [https://transequality.org/sites/default/files/docs/usts/USTSPASStateReport\(1017\).pdf](https://transequality.org/sites/default/files/docs/usts/USTSPASStateReport(1017).pdf).

Washington, DC: National Center for Transgender Equality.

<sup>5</sup> See American Medical Association, *Issue brief: Health insurance coverage for gender-affirming care of transgender patients* at 5 (2019), available at <https://www.ama-assn.org/system/files/2019-03/transgender-coverage-issue-brief.pdf>.

<sup>6</sup> See American Public Health Association, *Policy 20169: Promoting Transgender and Gender Minority Health through Inclusive Policies and Practices* (2016), available at <https://www.apha.org/policies-and-advocacy/public-health-policy-statements/policy-database/2017/01/26/promoting-transgender-and-gender-minority-health-through-inclusive-policies-and-practices>.

<sup>7</sup> See American Psychological Association, “Guidelines for Psychological Practice With Transgender and Gender Nonconforming People,” 70 AM. PSYCHOLOGIST 832 (2015), available at <https://www.apa.org/practice/guidelines/transgender.pdf>.

<sup>8</sup> See Jack Drescher & Eric Yarbrough, American Psychiatric Association, *Position Statement on Discrimination Against Transgender and Gender Diverse Individuals* at 2 (2018), available at <https://www.psychiatry.org/File%20Library/About-APA/Organization-Documents-Policies/Policies/Position-2018-Discrimination-Against-Transgender-and-Gender-Diverse-Individuals.pdf>.

<sup>9</sup> See American College of Obstetricians and Gynecologists Committee on Gynecologic Practice and Committee on Health Care for Underserved Women, *Committee Opinion Number 823: Health Care for Transgender and Gender Diverse Individuals* (2021), available at <https://www.acog.org/clinical/clinical-guidance/committee-opinion/articles/2021/03/health-care-for-transgender-and-gender-diverse-individuals>.

<sup>10</sup> See Jason Rafferty, *Ensuring Comprehensive Care and Support for Transgender and Gender-Diverse Children and Adolescents*, AMERICAN ACADEMY OF PEDIATRICS, 142 (2018), available at <https://publications.aap.org/pediatrics/article/142/4/e20182162/37381/Ensuring-Comprehensive-Care-and-Support-for?autologincheck=redirected?nfToken=00000000-0000-0000-0000-000000000000>.

of Child & Adolescent Psychiatry,<sup>11</sup> Endocrine Society,<sup>12</sup> Pediatric Endocrine Society,<sup>13</sup> and the World Professional Association for Transgender Health.<sup>14</sup>

This growing consensus is influenced by decades of research demonstrating that transition-related healthcare services are significantly associated with positive mental health outcomes including the reduction of suicidality, anxiety and depression. Moreover, transition-related care, including transition-related surgical treatments, were significantly associated with higher levels of body satisfaction, self-esteem and quality of life.<sup>15</sup>

### The Commonwealth's Existing Benchmark Plan

While transition-related healthcare is medically necessary for transgender people, it is not currently included under the Commonwealth's existing benchmark plan. Indeed, the benchmark plan expressly excludes coverage for "any procedure or treatment leading to or in connection with transsexual Surgery except for sickness or injury resulting from such Surgery."<sup>16</sup> Although the benchmark plan sets the floor, rather than the ceiling, for healthcare coverage, and as such does not prohibit other insurance plans offered in the Commonwealth from covering transition-related care, it ultimately supports the presumption that transition-related care is not necessary and encourages insurers to exclude it as a way to either reduce premiums or engage in adverse selection.

This presumption is wrong, however, as guidance from the Office of the Insurance Commissioner has made clear. In 2016, Insurance Commissioner Teresa Miller issued Notice Regarding Nondiscrimination, Notice 2016-05 ("the Notice" or "Notice 2016-05"), which clarified that categorical exclusions of transition-related healthcare were illegal under state and federal law. Under the Notice,

a policy will not exclude services based on gender identity and will not contain a categorical exclusion of coverage for all health services related to gender transition . . . and also will affirmatively provide that medically necessary covered services will be available to a policyholder regardless of their gender identity.<sup>17</sup>

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<sup>11</sup> See AACAP, *Transgender and Gender Diverse Youth* (2020), available at [https://www.aacap.org/AACAP/Families\\_and\\_Youth/Facts\\_for\\_Families/FFF-Guide/transgender-and-genderdiverse-youth-122.aspx](https://www.aacap.org/AACAP/Families_and_Youth/Facts_for_Families/FFF-Guide/transgender-and-genderdiverse-youth-122.aspx).

<sup>12</sup> See Endocrine Society, *Transgender Health: An Endocrine Society Position Statement* (Dec. 16, 2020), available at <https://www.endocrine.org/advocacy/position-statements/transgender-health>.

<sup>13</sup> See Pediatric Endocrine Society, *Transgender Care: Introduction to Health for Transgender Youth* (July 17, 2020), available at <https://pedsendo.org/patient-resource/transgender-care/>.

<sup>14</sup> See Eli Coleman et al., *Standards of Care for the Health of Transgender and Gender Diverse People, Version 8*, 23 INT'L J. OF TRANSGENDER HEALTH S1 (2022).

<sup>15</sup> See, e.g., Endocrine Society, *Transgender Health: An Endocrine Society Position Statement* (Dec. 16, 2020), available at <https://www.endocrine.org/advocacy/position-statements/transgender-health>; American College of Osteopathic Pediatricians, *ACOP Statement Against Anti-Transgender Health Laws in State Legislation* (Apr. 27, 2021), available at <https://acoped.org/acop-statement-against-anti-transgender-health-laws-in-state-legislation/>.

<sup>16</sup> Benchmark Plan at 74.

<sup>17</sup> Notice Regarding Nondiscrimination; Notice 2016-05, 46 Pa.B. 2251 (April 30, 2016), available at <https://www.pacodeandbulletin.gov/Display/pabull?file=/secure/pabulletin/data/vol46/46-18/762.html>.

In the succeeding seven years, Notice 2016-05 has not been rescinded by the Office of the Insurance Commissioner. As such, insurance plans governed by the Office of the Insurance Commissioner are currently required to provide coverage for medically-necessary transition-related services. This, however, is not clear from simply reviewing the Commonwealth's existing benchmark plan.

## Recommendations

At a bare minimum, the Commonwealth's benchmark plan needs to be updated to clarify that protected transition-related healthcare under Notice 2016-05 must be included in health insurance plans. In its simplest form, this could be achieved through a cross reference to Notice 2016-05.<sup>18</sup>

NCTE strongly recommends, however, that the Commonwealth's benchmark plan instead include a non-exhaustive list of transition-related care that is to be covered. While Notice 2016-05 clarifies that at least some coverage for transition-related care must be included, it does little to answer precisely what that coverage need entail. A non-exhaustive list of care would resolve many of these questions, significantly decreasing the need for costly and burdensome appeals and litigation to resolve just what care an insurance plan is supposed to cover.

Fortunately, the Commonwealth does not need to start from scratch in preparing such a list. Over the past several years, other states have moved to codified minimum requirements for transition-related care coverage. The Colorado Essential Health Benefits Benchmark Plan for 2023, for instance, clarifies that a number of procedures that are frequently deemed by insurance carriers to be cosmetic are in fact medically-necessary:

Medically-necessary treatment includes treatment for gender dysphoria and includes the following gender-affirming care services, at minimum:

1. Blepharoplasty (eye and lid modification)
2. Face/forehead and/or neck tightening
3. Facial bone remodeling for facial feminization
4. Genioplasty (chin width reduction)
5. Rhytidectomy (cheek, chin, and neck)
6. Cheek, chin, and nose implants
7. Lip lift/augmentation
8. Mandibular angle augmentation/creation/reduction (jaw)
9. Orbital recontouring
10. Rhinoplasty (nose reshaping)
11. Laser or electrolysis hair removal
12. Breast/Chest Augmentation, Reduction, Construction<sup>19</sup>

However, because the 2023 Colorado benchmark plan focused on medically-necessary care that was routinely denied, its list is not in fact comprehensive. As such, clarity for insurance providers, consumers, and

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<sup>18</sup> See, e.g., State of Vermont Essential Health Benefits Benchmark Plan, July 7, 2022, at 13 ("Medically Necessary treatment for gender dysphoria and related health conditions is covered to the extent required by 8 V.S.A. § 4724 and Insurance Bulletin 174."), available at [https://dfr.vermont.gov/sites/finreg/files/doc\\_library/VT%20BMP.pdf](https://dfr.vermont.gov/sites/finreg/files/doc_library/VT%20BMP.pdf).

<sup>19</sup> Colorado Department of Regulatory Agencies, Division of Insurance, Benefits for Health Care Coverage: Colorado Benchmark Plan at 38, available at [https://drive.google.com/file/d/1uO1hZ\\_-AlZmCGq4Y33YpAoeij9IuhHRC/view](https://drive.google.com/file/d/1uO1hZ_-AlZmCGq4Y33YpAoeij9IuhHRC/view).

regulators could be enhanced by providing a more extensive list that includes care that is currently routinely covered by insurance plans.

Fortunately, Pennsylvania's neighbor state of Maryland recently enacted the Trans Health Equity Act, a statute expanding Medicaid coverage of transition-related care. The Trans Health Equity Act includes a generalized list of treatment that must be covered by the state Medicaid program when medically-necessary, including:

1. Hormone therapy, hormone blockers, and puberty blockers;
2. Hair alteration for the purposes of altering secondary sex characteristics and surgical site preparation;
3. Alterations to voice, voice therapy, and voice lessons;
4. Alterations to abdomen, chest, trunk, and buttocks;
5. Alterations to the face and neck;
6. Alterations to the genitals and gonads;
7. Laser treatment for scars from gender-affirming treatment;
8. Standard fertility preservation procedures . . . ;
9. Revisions to previous treatments and reversal of treatments;
10. Combinations of gender-affirming procedures; and
11. Other treatments as prescribed to suppress the development of endogenous secondary sex characteristics, align the individual's appearance or physical body with gender identity, and alleviate symptoms of clinically significant distress resulting from gender dysphoria.<sup>20</sup>

In addition, the Trans Health Equity Act further provided that covered gender-affirming treatment "may include treatment described in the current clinical standards of care for gender-affirming treatment published by the World Professional Association for Transgender Health."<sup>21</sup>

While early drafts of the Trans Health Equity Act included a list of specific medical procedures that must be covered, Maryland legislators ultimately opted to instead include a generalized list of types of procedures that must be covered when medically-necessary, so as to allow covered treatments to change with evolving standards of care. As such, the Trans Health Equity Act provided that transition-related care must be covered when 1) it was prescribed because of the patient's gender identity, 2) treatment was medically necessary, and 3) it was "prescribed in accordance with current clinical standards of care."<sup>22</sup> The Act further provided that providers could not deem transition-related care to be non-covered cosmetic treatment when it otherwise met the criteria above.<sup>23</sup>

Because the 2023 Colorado benchmark plan leaves out types of transition-related care that it presumed was already covered and the Maryland Trans Health Equity Act is written in generalities that would leave some uncertainty as to which specific treatment was covered, NCTE would recommend an amalgam approach, in which the Commonwealth specifies in its benchmark plan that the following are EHBs:

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<sup>20</sup> Act Concerning Maryland Medical Assistance Program – Gender-Affirming Treatment (Trans Health Equity Act), Maryland S.B. 460 at § 15-151(A)(2)(II) (2023) (approved by Governor), *available at* <https://mgaleg.maryland.gov/mgawebsite/Legislation/Details/SB0460?ys=2023RS>.

<sup>21</sup> *Id.* at § 15-151(A)(2)(III).

<sup>22</sup> *Id.* at § 15-151(C)(3).

<sup>23</sup> *Id.* at § 15-151(C)(5).

1. Hormone therapy, hormone blockers, and puberty blockers;
2. Hair alteration for the purposes of altering secondary sex characteristics and surgical site preparation, including but not limited to laser or electrolysis hair removal;
3. Alterations to voice, voice therapy, and voice lessons;
4. Alterations to abdomen, chest, trunk, and buttocks, including but not limited to breast/chest augmentation, reduction, and construction;
5. Alterations to the face and neck, including but not limited to:
  - a. Blepharoplasty (eye and lid modification),
  - b. Face/forehead and/or neck tightening,
  - c. Facial bone remodeling for facial feminization,
  - d. Genioplasty (chin width reduction),
  - e. Rhytidectomy (cheek, chin, and neck),
  - f. Cheek, chin, and nose implants,
  - g. Lip lift/augmentation,
  - h. Mandibular angle augmentation/creation/reduction (jaw),
  - i. Orbital recontouring, and
  - j. Rhinoplasty (nose reshaping);
6. Alterations to the genitals and gonads;
7. Laser treatment for scars from gender-affirming treatment;
8. Standard fertility preservation procedures;
9. Revisions to previous treatments and reversal of treatments;
10. Combinations of gender-affirming procedures; and
11. Other treatments as prescribed to suppress the development of endogenous secondary sex characteristics, align the individual's appearance or physical body with gender identity, and alleviate symptoms of clinically significant distress resulting from gender dysphoria.

## Conclusion

NCTE greatly appreciates the Commonwealth of Pennsylvania's commitment to equity for all and the recognition of the challenges faced by transgender and gender-diverse communities. We strongly recommend adopting an EHB benchmark plan that guarantees access to transition-related healthcare according to the precepts outlined above. At a bare minimum, the EHB benchmark plan should include an express reference to the existing protections under Notice 2016-05, though in order to eliminate all confusion, NCTE strongly encourages the Office of the Insurance Commissioner to specify a minimum level of transition-related care in the benchmark plan.

Respectfully submitted,

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